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No. 88-839

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In the Supreme Court of the United States

OCTOBER TERM, 1988

ANDREW L. ARRUZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the military court violated petitioner's rights under the Confrontation Clause by admitting at trial the recorded and sworn testimony of a witness at a preliminary hearing, when that witness was found to be unavailable to testify at trial.

2. Whether petitioner was denied a fair trial when, after defense cross-examination left the impression that an examining psychiatrist did not believe the victim, the trial judge allowed the psychiatrist to testify that in his opinion the victim honestly believed she had had a sexual encounter with petitioner and that in his opinion her testimony was worthy of belief.

3. Whether the pretrial preliminary hearing required by Article 32 of the UCMJ, 10 U.S.C. 832, satisfies due process requirements.

4. Whether the admission of an unavailable witness's testimony at an Article 32 hearing violated Article 50 of the UCMJ, 10 U.S.C. 850, which restricts the use of testimony given before "courts of inquiry" conducted pursuant to Article 135 of the UCMJ, 10 U.S.C. 935.

5. Whether the trial court erred by admitting rebuttal testimony by an expert about the general characteristics of child abusers once the defense had made petitioner's character an issue in the case.

6. Whether the Court of Military Appeals must independently examine the sufficiency of the evidence in every case.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 8a-20a) is reported at 26 M.J. 234. The opinion of the Court of Military Review (Pet. App. 1a-7a) is reported at 21 M.J. 621.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 18, 1988. A petition for reconsideration was denied on September 22, 1988. Pet. App. 26a. The petition for a writ of certiorari was filed on November 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1986).

STATEMENT

Petitioner, a member of the United States Army, was convicted by a general court-martial at Mainz-

Gonsenheim in West Germany on two specifications of taking indecent liberties with a female under the age of 16, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to confinement for five years, dismissal from the service, and forfeiture of pay. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. The Court of Military Appeals affirmed.

1. Petitioner, an officer and a military chaplain, was charged with taking indecent liberties with a six-year-old girl on two occasions between December 29, 1982, and May 20, 1983. His victim, Heidi Carr, was the daughter of an Army sergeant whom petitioner had been seeing socially.

2. a. Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted before trial in the civilian courts. The accused has the right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, as well as the identity of his accuser, to cross-examine all available witnesses, and to present any testimony or documentary evidence in his defense. He may also present any evidence that would mitigate the severity of the offenses. A defendant has the right to have defense counsel appointed to assist him during the hearing. Art. 38, UCMJ, 10 U.S.C. 838 (1982 & Supp. IV 1986); Rule for Courts-Martial 405(f) and (g), *Manual for Courts-Martial, United States – 1984*. Moreover, the convening authority may not refer a charge to a general court-martial for trial without

independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (1982 & Supp. IV 1986).

b. In this case, Heidi Carr testified under oath during an Article 32 hearing. Both petitioner and his appointed defense counsel were present during her testimony. AX 11. The verbatim transcript of Heidi's testimony during the hearing totalled 46 pages, GX 5; Tr. 318, 319, of which 30 pages consisted of defense counsel's cross-examination of Heidi, GX 5, at 15-44.

Heidi said that she was seven years old and knew that it was wrong to lie. GX 5, at 1. She testified that she went to petitioner's apartment with her mother on several occasions. During one of their visits, Heidi's mother left Heidi alone with petitioner. *Id.* at 6. While her mother was gone, petitioner took Heidi into the bedroom, placed her on the bed, and "took out his penis and put it in [her] privates." *Id.* at 8. She described petitioner's penis as being placed "[i]n the hole * * * [a] little bit," and she said that it hurt. *Id.* at 9. She said that petitioner's penis got wet and "[h]e wiped it off with a [yellow] tissue." *Id.* at 12. Petitioner also kissed her on the lips and on the same place as where he put his penis. *Id.* at 9. Heidi further stated that the petitioner kissed her and engaged in other sexual acts with her, probably on more than six occasions. *Id.* at 10-12.

c. At trial, Heidi testified that she met petitioner when she accompanied her mother to his apartment. Tr. 219-220. Heidi's mother left Heidi alone in the apartment with petitioner, and petitioner took her into an "extra room." Tr. 226. Heidi stated that she did not remember what happened in that room. Tr. 226. After a recess, she explained that she did remember what happened, but did not "want to talk about it." Tr. 232. Despite attempts by the prosecutor and the trial judge to persuade Heidi to

testify, she adamantly refused to say anything further. Tr. 231-234. Heidi stated that she could not explain "it in front of the ladies." Tr. 234. She said she would be willing to testify if no "ladies were present." Tr. 234. Heidi left the stand briefly, and when the court reconvened, the trial judge noticed that a female was seated at the defense table. Tr. 243. Defense counsel identified her as a member of the defense team. Tr. 244. The trial judge noted that the female defense attorney had previously been a spectator to the proceeding and had not been identified as a member of the defense team. Tr. 244.

Heidi returned to the stand, and she again refused to "talk in front of the ladies." Tr. 279, 280, 284. Heidi was then excused. Defense counsel refused to have the female laywer leave the defense table during Heidi's testimony. Tr. 285-291. The trial judge refused to substitute his "judgment of the defense's motives for the articulated and stated reasons that the defense" gave. He denied a government motion for the removal of the female defense counsel and the spectators so that Heidi could testify. Tr. 292.

On the government's motion, the trial judge found that Heidi was unavailable to testify within the meaning of Mil. R. Evid. 804(a)(2). Tr. 292-293.[1] The government then moved, pursuant to Mil. R. Evid. 804(b)(1), to admit

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[1] The judge did not believe that Heidi would answer any questions on cross-examination under any circumstances. He found, "based upon my questioning of [Heidi] and my observation of her demeanor, and her reaction to the civilian defense counsel, that even if all spectators and females were excluded (over strenuous defense objection), and even if she answered questions of the trial counsel, there was no substantial likelihood that she would, thereafter, answer questions on cross-examination." Memorandum of Special Findings. The judge also determined that contempt proceedings for Heidi were not a plausible alternative. *Ibid.*

Heidi's testimony at the Article 32 hearing as the testimony of an unavailable witness. Tr. 294. The judge admitted the testimony over defense objection.

d. During trial, the prosecution called Dr. Michael Vandewalle, an expert in child psychiatry who had examined Heidi on four prior occasions, in order to explain to the court-martial panel members how a child might react to sexual abuse. Tr. 350, 357, 359. Dr. Vandewalle said that the perceptions of young children are at times exaggerated and distorted. Tr. 370. He stated that children often delay reporting molestation when the molester is someone who is close to the family. Tr. 369. He also described the psychiatric traits and characteristics associated with sexually abused children. Tr. 360-363. Dr. Vandewalle testified that Heidi displayed many of those characteristics. Tr. 367.

During cross-examination, defense counsel asked Dr. Vandewalle if he believed Heidi's testimony. Dr. Vandewalle said that "something could have happened, but [he] didn't necessarily believe all the stuff that was in the [pretrial hearing]." Tr. 394. The trial judge then asked Dr. Vandewalle several questions proposed by the panel members; defense counsel objected to two of the questions. Tr. 409.[2] In response to the questions submitted

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[2] The questions to which defense counsel objected were:

"In your professional opinion do you believe Heidi Carr had a sexual encounter with [petitioner]?"

"Does Heidi Carr believe that she did have a sexual encounter with [petitioner]?"

Defense counsel objected to the questions on the ground that they went to the ultimate issue (*i.e.*, petitioner's guilt), and on the ground that they were irrelevant. The prosecutor argued that defense counsel had opened the door to the panel members' inquiry by asking Dr. Vandewalle if he believed the substance of Heidi's testimony. Tr. 408-410.

by the court members, Dr. Vandewalle stated that in his opinion Heidi believed she had had a sexual encounter with petitioner and that it was also his professional opinion that Heidi did have a sexual encounter with petitioner. Tr. 410-411.[3]

3. The Army Court of Military Review affirmed. Pet. App. 1a-7a. It upheld the trial court's finding that Heidi was unavailable, within the meaning of Mil. R. Evid. 804(a)(2) and (b)(1). Pet. App. 3a. The court also held that Heidi's testimony at the Article 32 hearing "was buttressed by sufficient indicia of reliability," and that the admission of her pretrial testimony therefore did not violate the Confrontation Clause of the Sixth Amendment. Pet. App. 3a-4a. In addition, the court held that the trial judge did not err by allowing Dr. Vandewalle to give his opinion as to Heidi's beliefs and the credibility of her testimony, because the defense had opened the door on cross-examination by asking the doctor for his personal opinion of Heidi's veracity. *Id.* at 5a. In any event, the court found that petitioner was not prejudiced by the admission of the doctor's testimony. *Id.* at 7a.

4. The Court of Military Appeals granted review limited to two questions and affirmed. Pet. App. 8a-20a. The first question involved the admissibility of Heidi's testimony from the Article 32 proceeding. The court found that Heidi was unavailable to testify at trial because "through a combination of trial maneuvers and apparent intimidation, civilian defense counsel succeeded in silencing [Heidi] at the court-martial." *Id.* at 9a (footnote omit-

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[3] Dr. Vandewalle further testified that he believed there was a sexual touching, but that he did not believe Heidi's statements that she was raped. Tr. 412. He said that Heidi believed that she was penetrated, but that she had an insufficient concept of "penetration" and her perception was therefore distorted. *Ibid.*

ted). The court held that Heidi's pretrial testimony was properly admitted under Mil. R. Evid. 804(b)(1) and that its admission did not violate the Sixth Amendment Confrontation Clause. Pet. App. 11a.

The second question involved the admissibility of Dr. Vandewalle's responses to the questions regarding Heidi's beliefs and her credibility. The court held that petitioner was not entitled to a new trial based on the admission of Dr. Vandewalle's answers in response to those inquiries from the panel members, because the defense had "opened the door" to the testimony by asking Dr. Vandewalle on cross-examination whether Heidi had lied or fantasized about the events at issue in the case. *Id.* at 16a. Even if the admission of the two answers was error, however, the court held that the error was harmless. *Ibid.*[4]

ARGUMENT

1. Petitioner claims (Pet. 12-14) that the admission at trial of Heidi Carr's testimony at the Article 32 hearing violated the Confrontation Clause of the Sixth Amendment. Petitioner argues that Heidi was available to testify at trial and that her testimony at the Article 32 hearing should not have been admitted, because he did not have a full and fair opportunity to cross-examine her at that hearing. His only motive for questioning Heidi at that time, petitioner argues, was to obtain discovery. That claim lacks merit.

a. To begin with, petitioner's counsel was at least partially responsible for Heidi's refusal to testify at trial, as

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[4] Judge Sullivan concurred in the result, on the ground that the defense had opened the door to Dr. Vandewalle's testimony. Pet. App. 19a. Chief Judge Everett dissented. He stated that in his view it was prejudicial error to permit the panel's questions to be answered. *Id.* at 20a.

the Court of Military Appeals found. Pet. App. 9a. Heidi told the trial judge she would not testify "in front of the ladies." Tr. 234. After Heidi made that statement, a female lawyer, who had not previously appeared for the defense, took a place at the defense table. Tr. 243-244. The defense refused to have the female attorney leave the courtroom during Heidi's testimony. R. 292. See also Memorandum of Special Findings. Accordingly, the Court of Military Appeals properly found that defense counsel's conduct contributed to Heidi's unavailability at trial.[5]

Under these circumstances, petitioner cannot claim that his confrontation rights were violated. Relying on a concept of implicit waiver or the principle that a person should not profit by his own wrongdoing, the courts have consistently refused to allow a defendant to complain about the lack of confrontation when the defendant himself wrongfully caused a witness's unavailability.[6] The waiver or estoppel doctrine applied in these cases rests "on a principle of reciprocity similar to the equitable doctrine of 'clean hands.' " *Steele* v. *Taylor*, 684 F.2d 1193, 1202 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983). That principle is applicable here. Given the actions of petitioner's counsel, which may be charged to petitioner

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[5] Petitioner's claim (Pet. 13) that Heidi's refusal to testify was prompted by her fear of being exposed as a liar is unsupported by anything in the record.

[6] See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 158-160 (1878); *United States* v. *Mastrangelo*, 722 F.2d 13 (2d Cir. 1983), cert. denied, 467 U.S. 1204 (1984); *Steele* v. *Taylor*, 684 F.2d 1193, 1200-1204 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *United States* v. *Thevis*, 665 F.2d 616, 630-633 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Balano*, 618 F.2d 624, 628-630 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States* v. *Carlson*, 547 F.2d 1346, 1355-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

himself (*Taylor* v. *Illinois*, No. 86-5963 (Jan. 25, 1988), slip op. 16-18), petitioner should not now be heard to claim that he was denied the right to confront Heidi at trial.

b. Even aside from the question of defense counsel's responsibility for Heidi's refusal to testify at trial, Heidi's pretrial testimony was independently admissible as the testimony of an unavailable witness at a prior judicial proceeding. Rule 804(b)(1) of the Military Rules of Evidence provides that the verbatim record of an Article 32 proceeding is admissible at trial if the declarant is unavailable. Accord Fed. R. Evid. 804(b)(1). Rule 804(a)(2), Mil. R. Evid., provides that a declarant is unavailable if he persists in refusing to testify concerning the subject matter of his prior statement despite an order by the trial judge to testify. In *California* v. *Green*, 399 U.S. 149 (1970), and *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court held that the admission of the preliminary hearing testimony of an unavailable witness does not violate the Confrontation Clause as long as the defendant is given a fair opportunity to cross-examine the witness at the hearing.

In this case, the trial judge found that Heidi was unavailable to testify at trial, and that finding was upheld by both military appellate courts. Pet. App. 3a, 9a. It therefore does not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).[7] Since Heidi was unavailable to testify

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[7] The trial judge's finding is also amply supported by the record. In fact, the trial judge did everything possible to convince Heidi to testify. After her initial refusal to testify, Tr. 229, Heidi was twice recalled to the stand, Tr. 231, 279, but she refused to testify on both occasions despite the judge's efforts. The trial judge told Heidi that she had to testify, Tr. 234, the judge offered to videotape her

at trial, the admission of her testimony at the Article 32 hearing did not violate the Confrontation Clause, because her testimony was "given under circumstances closely approximating those that surround the typical trial." *California* v. *Green*, 399 U.S. at 165. The charges against petitioner were the same at the Article 32 proceeding as at trial. Heidi was under oath during her testimony at the Article 32 proceeding. Petitioner was present at the hearing, and he was represented by the same appointed counsel who represented petitioner at trial. The pretrial hearing provided a verbatim record of Heidi's testimony. And not only did petitioner have an opportunity to cross-examine Heidi at the Article 32 proceeding, he took full advantage of that opportunity: 30 of the 46 pages of Heidi's testimony consist of defense cross-examination. The decision below is therefore fully consistent with this Court's decisions in *California* v. *Green*, *supra*, and *Ohio* v. *Roberts*, *supra*, which upheld the admission of the preliminary hearing testimony of an unavailable witness in similar circumstances.

Petitioner contends (Pet. 13) that the admission of Heidi's pretrial testimony was erroneous since his cross-examination at the earlier proceeding was conducted solely for discovery purposes. That claim lacks merit. Although

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testimony with only himself, petitioner, and counsel present, Tr. 275-276, and the judge asked defense counsel if he would object to the removal of all women in the courtroom in order to persuade Heidi to testify. Tr. 285. Defense counsel, however, objected to any of the court's proposed solutions to the problem of Heidi's unwillingness to proceed. Tr. 283. The trial judge determined "that the threat of contempt proceedings [wa]s not a viable consideration for dealing with a seven-year-old witness." Memorandum of Special Findings.

petitioner's counsel did say at the Article 32 hearing that he would limit his cross-examination of Heidi to discovery purposes (Pet. 9), each of the courts below found that counsel did not so limit his questioning. See Pet. App. 2a-3a, 10a-11a.[8] As the verbatim transcript of the Article 32 proceeding shows, see GX 5,[9] defense counsel's questions "comported with the principal purpose of cross-examination: to challenge 'whether the declarant was sincerely telling what [she] believed to be the truth, whether the declarant accurately perceived and remembered the matter [she] related, and whether the declarant's intended meaning is adequately conveyed by the language [she] employed.' " *Ohio* v. *Roberts,* 448 U.S. at 71 (citation and emphasis omitted). The record thus demonstrates that petitioner had the opportunity to develop Heidi's testimony in any manner he deemed in his interest and that defense counsel made full use of that opportunity.[10] In these circumstances, the courts below correctly rejected petitioner's claim.

2. Petitioner contends (Pet. 14-15) that the trial court erred by allowing Dr. Vandewalle to answer two questions from the court-martial panel by stating that he believed

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[8] The trial judge entered special findings that defense counsel's cross-examination at the hearing was for the dual purpose of impeachment and discovery. Memorandum of Special Findings.

[9] Defense counsel not only questioned Heidi's memory of the events, but also attacked her veracity by attempting to demonstrate that she had substantial knowledge about sex and had in the past made complaints about being sexually abused. See GX 5, at 21-33.

[10] Petitioner claims (Pet. 13) that cross-examination at a preliminary hearing is not as valuable as cross-examination at trial. That may often be true, but it is also immaterial. This Court has held that it is unnecessary to inquire into the effectiveness of defense cross-examination at a particular pretrial hearing. *Ohio* v. *Roberts,* 448 U.S. at 73 n.12.

Heidi had been sexually assaulted.[11] That claim lacks merit since defense counsel opened the door to the panel's questions, as each court below found. See Pet. App. 5a, 16a, 19a (Sullivan, J., concurring).

Defense counsel's cross-examination created the erroneous impression that Dr. Vandewalle did not believe Heidi had been abused and that he believed she may have been fabricating her story. Tr. 386, 398; Pet. App. 12a-13a n.4. The defense thus opened the door to the panel's questions concerning Dr. Vandewalle's beliefs. Petitioner tacitly concedes as much by arguing (Pet. 15) that he had no other means of challenging Heidi's credibility once the trial judge admitted Heidi's Article 32 testimony. But since petitioner was at least partially responsible for Heidi's unavailability, petitioner cannot now claim that he was in effect forced to try to get Dr. Vandewalle to suggest that he did not believe Heidi's story. In any event, given the other proof of petitioner's guilt, the military appellate courts correctly found that any error could not have prejudiced petitioner. Pet. App. 7a, 16a.

3. Petitioner next contends (Pet. 11-12) that the military justice system should be required to follow pretrial procedures comparable to civilian grand jury proceedings before a servicemember can be charged with sexual assault.[12] That claim is meritless. The Fifth Amend-

[11] Petitioner also claims that the only role for psychiatric testimony in a child abuse case is to establish or refute a claim that a child suffers from a mental illness affecting her credibility. Petitioner cites no authority for that proposition, and it lacks merit. Testimony about the effects of abuse or molestation on a child victim can be an appropriate subject for expert testimony. See, *e.g.*, *United States* v. *Snipes*, 18 M.J. 172 (C.M.A. 1984); *United States* v. *Moore*, 15 M.J. 354 (C.M.A. 1983); *State* v. *Myers*, 359 N.W.2d 604, 610 (Minn. 1984).

[12] The Court of Military Appeals did not grant review on this question, or on any of the other questions hereafter discussed in this brief. Accordingly, it is not clear that those questions are even subject to

ment Indictment Clause specifically exempts "cases arising in the land or naval forces" from the requirement of an indictment by grand jury for serious crimes. *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 123 (1866). In the military system, the pretrial adversarial Article 32 hearing serves the grand jury's function of determining whether there is probable cause that a crime has been committed and protecting servicemembers against unfounded accusations. Compare *Branzburg* v. *Hayes,* 408 U.S. 665, 686-687 (1972). In fact, the Article 32 hearing guarantees a servicemember protections not afforded to his civilian counterpart. *Gosa* v. *Mayden,* 413 U.S. 665, 681 n.6 (1973) (plurality opinion). See also *United States* v. *Ledbetter,* 2 M.J. 37, 43 (C.M.A. 1976); *Mercer* v. *Dillon,* 19 C.M.A. 264, 266, 41 C.M.R. 264, 266 (1970); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant,* 22 Me. L. Rev. 105, 109-114

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review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) (Supp. IV 1986) and 10 U.S.C. 867(h)(1) (Supp. IV 1986), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Section 867(h)(1) further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right, which it exercised in this case, to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Because the Court of Military Appeals accepted for review only the first two questions raised here by petitioner, there is a question whether that court rendered a "[d]ecision" on the remaining issues that petitioner presents in his petition, and whether the refusal to accept the remaining issues for review constituted an "action" of that court "in refusing to grant a petition for review" within the meaning of Section 867(h)(1). Those questions do not require an answer in this case, however, because none of the issues presented by petitioner warrant review by this Court in any event.

(1970). Compare *Gerstein* v. *Pugh*, 420 U.S. 103, 119-125 (1975) (describing limited procedures required at a civilian pretrial probable cause hearing). The pretrial procedures employed in the military justice system therefore satisfy any possible due process requirements.

4. Petitioner claims (Pet. 18-20) that the trial judge erred by admitting evidence during the government's rebuttal case concerning the general characteristics of a sexual abuser. That claim arose in the following setting: At trial, petitioner introduced sworn affidavits from various acquaintances stating, in effect, that petitioner was moral and law-abiding. DXs P-T and Y-Z. In rebuttal, the government offered the testimony of an expert, Dorothy Ogilvy-Lee, in order to respond to petitioner's suggestion that a law-abiding citizen is incapable of committing sexual abuse. The trial judge found that Ogilvy-Lee was an expert, Tr. 710, and permitted her to testify about the general characteristics of child abusers.[13] On cross-examination, defense counsel elicited several inconsistencies between those characteristics and petitioner's, Tr. 761-768, and counsel later argued that petitioner did not fit the profile that Ogilvy-Lee described. Tr. 821-822.

Contrary to petitioner's contention, Ogilvy-Lee's testimony was relevant because it responded to petitioner's suggestion that, as a law-abiding citizen, he was incapable of committing sexual abuse. Moreover, the risk that petitioner was prejudiced by Ogilvy-Lee's testimony is extremely low. She did not suggest that petitioner was a child abuser; rather, she testified only that his status did not

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[13] Ogilvy-Lee testified that the profile indicated (1) aggressive sexual offenses against children are the exception rather than the rule; (2) most abusers are heterosexual; (3) they are "non-assertive and non-violent"; (4) they are often well known to the victim; and (5) they tend to be individuals who have no record of prior criminal behavior. Tr. 757-761.

preclude it. She also testified that "[p]robably a fairly large part" of the male population shares the characteristics of a sexual offender. Tr. 768 She said that a sexual offender can be a "professional, semi-professional, or skilled blue collar" worker. Tr. 771. Finally, the trial judge instructed the panel members to consider Ogilvy-Lee's testimony solely "as evidence that persons who are credible, moral, and law abiding are capable of committing the alleged offenses." Tr. 866. The members were expressly instructed "not to consider her testimony as evidence that it is more probable that [petitioner] committed the alleged offenses." *Ibid.* Under these circumstances, the admission of Ogilvy-Lee's testimony was not error.

5. Petitioner also contends (Pet. 15-18) that Heidi's Article 32 testimony was admitted in violation of Article 50 of the UCMJ, 10 U.S.C. 850. Article 50 prohibits the admission, at a capital trial or in a case in which a commissioned officer may receive a dishonorable or bad conduct discharge, of testimony given by a witness at a "court of inquiry." Petitioner, however, has confused an Article 32 hearing with a military court of inquiry.

A court of inquiry is a formal fact-finding tribunal consisting of three or more members convened under Article 135 of the UCMJ, 10 U.S.C. 935. A court of inquiry is used to conduct an investigation only when no other tribunal is available and when the matter is of grave importance to the military or to the individual, such as when a ship is sunk. Although a court of inquiry is a formal investigation, the rules of evidence do not apply to such an investigation.[14] By contrast, an Article 32 hearing, such as

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[14] See Army Reg. 27-10, *Legal Services: Military Justice* para. 10-2 (July 10, 1987). Before a court of inquiry, the parties are denominated as those "whose conduct is subject to inquiry" and those having "a direct interest in the inquiry." Parties may be designated at the begin-

the one held in this case, is not a court of inquiry. It is a pretrial hearing comparable to a preliminary hearing in the civilian criminal justice system, and it is a prerequisite to convening a general court-martial. Unlike a court of inquiry, an Article 32 hearing offers the accused the same opportunity, and supplies him with the same motivation, to defend himself against his accusers that he has at trial. In addition, the Military Rules of Evidence apply at an Article 32 hearing.

In this case, no court of inquiry was assembled. Article 50 of the UCMJ is therefore inapposite. Moreover, Mil. R. Evid. 804(b)(1) provides that the testimony of a witness given at an Article 32 hearing may be admitted at trial and therefore rebuts any suggestion that the prohibition in Article 50 should apply to Article 32 proceedings. Because the pretrial proceeding held in this case was an Article 32 hearing and not an Article 135 court of inquiry, petitioner's reliance on Article 50 is misplaced.

6. Petitioner claims (Pet. 20-22) that the Court of Military Appeals must review the record in every case to ensure that the evidence is sufficient to support a conviction. That claim lacks merit. The Court of Military Appeals has the statutory authority, which it exercised in this case, to limit its decision in any case to less than all the issues presented by a defendant. 10 U.S.C. 867(d). That provision was designed to allow the Court of Military Appeals to resolve only those issues of general importance to the entire military justice system. Moreover, the court of military review must independently review the sufficiency of the evidence in every case pursuant to Article 66(c) of the UCMJ, 10 U.S.C. 866(c). That requirement, which

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ning of the inquiry or later in the proceedings. *Id.* para. 10-5. The presence of the parties is not essential. See *id.* paras. 10-3 to 10-8.

was satisfied here, see Pet. App. 3a, ensures that the evidence is sufficient to support a servicemember's conviction.[15]

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[15] Petitioner at two points (Pet. 10-11, 22-23) suggests that there is a constitutional flaw in the statute permitting the Court of Military Appeals to foreclose this Court's certiorari jurisdiction by declining to grant review of particular decisions of the courts of military review. Petitioner cites no authority for that proposition, and we believe there is no merit to it.

Prior to 1983, this Court had no certiorari jurisdiction over Court of Military Appeals cases at all. The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, created certiorari jurisdiction in military cases for the first time, but limited that jurisdiction to cases in which the Court of Military Appeals had granted review. Before that Act was passed, it was accepted that the judgments of military courts were not subject to direct review by this Court in any case. See *In re Yamashita*, 327 U.S. 1, 8 (1946); *Fowler* v. *Wilkinson*, 353 U.S. 583, 584 (1957). Since the federal courts have only the jurisdiction that Congress has granted, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, No. 87-1372 (Jan. 23, 1988), slip op. 4, there is no constitutional infirmity in a statute which ameliorates the former rule, but does so only with respect to a limited number of cases in the military system. In any event, this case does not properly present that question, because the Court of Military Appeals granted review in this case, and because it is unclear whether the limitation on this Court's certiorari jurisdiction applies to non-granted issues in cases in which the Court of Military Appeals has granted review of the lower court's judgment. See pages 12-13 note 12, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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